IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 151 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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GUJARAT ELECTRICITY BOARD

Versus

PATEL SHANKERBHAI DUNGARDAS

Appearance:

1. Civil Revision Application No. 151 of 2002

MR ASIM J PANDYA for Petitioner No. 1

MS KJ BRAHMBHATT for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 05/07/2002

ORAL JUDGEMENT

#. Rule. Ms.K.J.Brahmbhatt, learned advocate waives service of rule on behalf of the respondent. With consent, this Civil Revision Application is being heard and disposed of finally.

#. This is a Revision Application under Section 115 of the Civil Procedure Code, 1908, challenging the order dated 21.11.2001 recorded by the learned 3rd Jt. Civil Judge (S.D.), Mehsana in Civil Misc. Application No.52/1998 filed by the present respondent - original defendant in Special Civil Suit No.75/1992.

#. It seems that the petitioner herein, had filed the aforesaid Civil Suit being Special Civil Suit No.75/1992 for recovery of dues. It seems that the summons was duly served and thereafter respondent herein, appeared in the said suit alongwith his advocate. After some time, the respondent stopped attending the said matter and, thereafter, the trial Court proceeded with the aforesaid Special Civil Suit and a decree was passed in the said Special Civil Suit on 30.10.1996.

#. The respondent herein, being the defendant in said Special Civil Suit did not file any appeal challenging the said decree of the said Court.

#. Thereafter the petitioner issued a notice to the respondent on 8.3.1997 stating that a decree as aforesaid was passed in the aforesaid Special Civil Suit, and therefore the respondent herein, was posted with an intimation that the said Special Civil Suit was decreed in favour of the present petitioner.

#. Thereafter the petitioner preferred Execution Petition being Special Execution Petition No.34/1997 on 1.10.1997. The respondent was served in the said matter and thereafter he contacted his advocate and came to know that a decree was passed against him. Thereafter he preferred Civil Misc. Application being Civil Misc. Application No.52/1998 before the aforesaid Court under Order-9 Rule 13 of the Civil Procedure Code for setting aside the said decree. After hearing the parties the learned trial Judge found that the decree was required to be set aside, accordingly the learned trial Judge set aside the aforesaid decree dated 30.10.1996 by order dated 21.11.2001. The learned trial Judge also directed the present respondent to deposit cost of Rs.2,000/- and on such deposit being made, the said decree was set aside.

#. Feeling aggrieved by the said order of the trial Court the petitioner original plaintiff has preferred this Revision Application before this Court under Section 115 of the Civil Procedure Code. The petitioner has mainly contended that the application filed by the respondent herein, for setting aside the decree in

question under Order-9 Rule-13 of the said Code was ex-facie illegal and, therefore, the trial Court could not have set aside the said decree on the said application. It is further contended that the respondent had not satisfactorily explained the reasons for not appearing in the aforesaid suit and, therefore, also the trial Court ought not to have granted the said application for setting aside the exparte decree. It is, therefore, contended that the present Revision Application be allowed and the aforesaid order passed by the trial Court on 21.11.2001 be quashed and set aside.

#. Notice was issued and Ms K.J Brahmbhatt, appears on behalf of the respondent. After hearing, rule was issued and she waived service of rule on behalf of the respondent. By consent of the learned advocates for the parties this Revision Application is being heard and disposed of finally.

#. It is an admitted position that a suit was filed as aforesaid by the petitioner against respondent for recovery or Rs.67,882.49 ps. and that suit was registered as Special Civil Suit No.75/1992. It is also an admitted fact that the decree was passed in the aforesaid Civil Suit by the said Court on 30.10.1996. It is an admitted position that after obtaining decree, the petitioner had issued a notice to the respondent informing him about the fact of passing of decree in the said suit on 8.3.1997. The said intimation sent to him by Registered Post A.D. was duly served upon the respondent and there is no dispute about the same. However, the respondent herein, preferred the aforesaid application for setting aside the said decree before the said Court on 2.11.1998. This fact is also not in dispute before me.

##. The pertinent question which arises is as to whether the said application filed by the respondent for setting aside the said decree under Order-9 Rule 13 of the said Code shall be treated to be within limitation.

##. It would be worthwhile to refer to the provision made under Article 123 of the Limitation Act, 1963, which shows that to set aside a decree passed exparte or to rehear an appeal decreed or heard exparte, the limitation is 30 days and in Column No.3 it has been stated that the time from which the period would begin to run would be the date of decree or when the summons or notice was not duly served, when the applicant had knowledge of the decree.

##. In the present case, it is an admitted position that summons was duly served upon the respondent and the respondent had appeared before the trial Court alongwith his advocate also and participlated in the said suit also. Therefore, the time from which it would begin to run would be from date of decree. In other words, the limitation would start running from the date on which the decree was passed.

##. As said earlier, the decree was passed in the aforesaid Special Civil Suit by the said Court on 30.10.1996 and, therefore, the application for setting aside the said decree in the said Special Civil Suit under Order-9 Rule 13 was required to be filed on or before 29.11.1996. The said application has been filed on 2.11.1998, which shows that the application filed by the respondent under Order-9 Rule 13 of the said Code hopelessly time barred.

##. It is pertinent to note that though the application submitted under Order-9 Rule 13 by the respondent before the trial Court for setting aside the said exparte decree was filed very late, the said application was not coupled with or accompanied with an application under Section 5 of the Limitation Act, 1963. This further shows that no condonation of delay was sought by the respondent before the said Court.

##. Even on going through the order of the learned Civil Judge, it does not appear to be a fact that the respondent had even orally requested the trial Court to condone the delay caused in filing of the said application. In that view of the matter, the application was time barred and looking to the total period for which the application was filed late, there was no necessity for the trial Court to overlook the said position and to set aside exparte decree on a mere order of payment of cost of Rs.2,000/-.

##. In above view of the matter, it is very clear that the trial Court had no jurisdiction to pass such an order setting aside the exparte decree by allowing a time barred application under Order 9 Rule 13 of Civil Procedure Code without an application or oral request for condoning long span of delay under section 5 of the Limitation Act, 1963. Thus, the trial court has committed jurisdictional error in passing the impugned order. When the orders have been passed by the trial Court against the provision of law then it becomes a duty of this Court to interfere with the said order in exercise of a Revisional jurisdiction. In other words,

the order passed by the trial Court, which has been impugned in this Civil Revision Application is ex-facie, illegal and therefore deserves to be quashed and set aside.

##. For the foregoing reasons, this Civil Revision Application is allowed. The order passed by the trial Court on 21.11.2001 setting aside the exparte decree passed in Special Civil Suit No.75/1992 is ordered to be quashed and set aside. In that view of the matter, the order of the trial Court directing the respondent to deposit the cost of Rs.2,000/- will also stand set aside. The learned advocate for the respondent states that the respondent has deposited the said amount before the trial Court. It would be open to the trial Court to make adjustment about the said amount against the amount due to the petitioner, herein, in accordance with the decree in question. Rule is made absolute. No order as to costs.

(D. P. BUCH, J.)
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